IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.960 OF 1988

1. Subhash Baburao Jagtap,
age 38 years, Occ. Service,
residing at 249, Somwar Peth,
Pune -11.

2. Ashok Babanrao Bali,
age 24 years, Occ. Wireman,
residing at 220, Somwar Peth,
Pune-11.

Both at present in Yerwada
Central Prison, Yerawada, Pune. .. Appellants.

Vs

The State of Maharashtra, Respondent.

Shri Ganesh Gole, for the appellants/accused.
Smt. U.V.Kejriwal, APP, for the respondent.

CORAM : Smt.Ranjana Desai &
D.B.Bhosale, JJ.

DATE : 16th June, 2005.

ORAL JUDGMENT : (Per D.B.Bhosale, J.)

1. This appeal is directed against the Judgment and order dated 5.10.1988 rendered by the learned Addl.Sessions Judge, Pune in Sessions Case No.434 of 1987, by which both the appellants-accused have been convicted for the offence punishable under section 302 read with 34 of Indian Penal Code and sentenced

to suffer imprisonment for life. The accused were charged and tried for the said offence for causing death of Shaikh Yusuf Shaikh Rajjak on 9.9.1987 at about 10.30 pm.

2. This appeal was admitted on 4.11.1988 and both the accused were directed to be released on the same bail bonds as in the trial Court. It appears that on 29.10.2004 when this appeal was placed for final hearing, office was directed to issue Court service notice to the accused making it returnable on 6.12.2004 in view of the fact that their Advocate on record was absent on three earlier occasions. After service of notice to the accused, on 10.1.2005 accused no.1 appeared in-person and prayed for time to engage advocate. The police report disclosed that accused no.2 was not available for service and hence non-bailable warrant against accused no.2 was issued and it was made returnable on 7.2.2005. The Sessions Court was directed to take necessary steps for issuance of notice to the sureties in respect of accused no.2 - Ashok Babanrao Bali expeditiously and to submit the progress in that regard to this Court in the first week of April, 2005. It further appears that on 29.4.2005 this Court directed to fix the appeal for final hearing in the week commencing from

13.6.2006 and accordingly the appeal was placed before us for its final disposal. Today when the matter was called out, Mr Ganesh Gole, Advocate appeared for accused no.1. It appears that one Mr S.B.Shirole, advocate had earlier filed Vakalatnama on behalf of both the accused and subsequently Mr Gole, after taking no objection from Mr Shirole, filed V.P. for accused no.1 only on 25.4.2005. In view thereof, V.P. of Shri S.B.Shirole, Advocate continues for accused no.1. Mr Shirole remained absent on all the occasions whenever this matter appeared for final hearing. In the circumstances, we were constrained to proceed with the hearing of this appeal in the absence of Mr S.B.Shirole, advocate for accused no.2. Mr Gole, learned Advocate appearing for accused no.1, on our request, agreed to argue this appeal even on behalf of accused no.2.

3. Briefly stated, the prosecution case is that on 9.9.1987 at about 10 pm deceased Yusuf, Juber, Mukhtyar and others were sitting in the compound of Appollo Talkies. Accused no.2-Ashok went there and there was a quarrel between accused no.2 and deceased. In the said quarrel, it is alleged that deceased tore the shirt of accused no.2 - Ashok. The said quarrel was intervened by Shaikh Mukhatyar and

Juber. The evidence on record further discloses that thereafter deceased, Hameed and Juber were coming in autoriksha to Raj Hans Lodge and when they reached Nageshwar Cycle Mart Accused no.2 dragged deceased - Yusuf from the Riksha and started beating him with fist blow. Accused no.1, who was watching the incident from distance, also joined accused no.2 and both the accused started assaulting deceased Yusuf by fist blow. They were separated by Mohd Sherif, brother of the deceased. Thereafter, both went home and within short time therefrom, while Mohd Sherif (PW 1) was taking his brother Yusuf home, accused no.1 came running from behind with a dagger in his hand and stabbed Yusuf on the left side of his abdomen below his ribs. It is further alleged that accused no.2 also banged his head on Yusuf. Immediately after the alleged assault, both the accused fled and while doing so they dropped the dagger at the scene of offence. Thereafter, Yusuf was removed to the hospital where he was declared dead. Mohd Sherif (PW 1) lodged the complaint to Samarth Police Station in the same night. Immediately after registration of the offence, Chougule (PW 11) set the investigation in motion. On completion of the investigation, the chargesheet was submitted against both the accused and after

committal of the case to the Sessions Court the accused were tried for the offence under section 302 read with 34 of IPC and convicted by the impugned judgment.

4. Mr Gole, learned counsel appearing for the accused, on behalf of accused no.1, fairly stated that he has instructions from accused no.1, who was present in Court, not to press this appeal for acquittal and, therefore, he argued the appeal on behalf of accused no.1 for bringing the offence down from 302 to 304 (Part II) I.P.C. He prayed that accused no.1 may be released with the sentence he has already undergone. He also submitted that accused no.1 is now 53 years old and has two daughters of marriageable age. He further submitted that accused no.1, after the alleged incident, lost his job in Pune Municipal Corporation and more than 15 years have passed since then. He, therefore, submitted that the accused may be released with the sentence already undergone by imposing reasonable fine on the accused. In view of this submission, we considered the case of accused nos. 1 and 2 together, though Mr Gole was not in a position to make such statement on behalf of accused no.2.

5. With the assistance of Mr Gole, we

scrutinised the entire evidence on record. The prosecution, to bring home the guilt of the accused persons, examined 11 witnesses, consisting of three eye-witnesses, viz. Mohd Sherif (PW 1), Juber Shaikh (P.W.4) and Dadamiya (PW 6). Khaire (PW 2), Jagtap (PW 3), Raut (PW 8) and Jadhav (PW 9) are the panch witnesses, who were examined by the prosecution to prove different panchanamas including recovery of the articles, such as clothes of the accused at their instance. P.W. 7 is Dr.Bade, who conducted autopsy on the dead body of Yusuf. Tote (PW 10) - Government photographer was examined to prove the photographs taken by him at the scene of offence and of the dead body of the deceased. P.W. 11 Chaugule is the investigating officer who conducted the investigation in the alleged offence. The prosecution also placed reliance on the evidence in the nature of chemical analyst report, post mortem notes, panchanamas, FIR etc. We perused the evidence of all the eye-witnesses, viz. Mohd Sherif (PW 1), Shaikh (PW 4), Dadamiya (PW 6). In so far as the actual assault is concerned, we found that the evidence is consistent and truthful. All the three eye-witnesses have specifically stated that accused no.1 came running with dagger in his hand and assaulted deceased Yusuf on the left side of his abdomen. It

is true that there are some discrepancies and inconsistencies in their depositions on oath but, in our opinion, they are negligible and would not shake their testimonies in so far as the assault on the deceased, which they claim that they had seen, is concerned. We did not find any reason to discard their testimonies, coupled with the other evidence on record which clearly establish their presence at the scene of offence. Their presence at the scene of offence, in our opinion, was natural. Even the evidence of Dr Bade and the post mortem notes clearly supports ocular version of all the three eye-witnesses. Similarly the recovery of the clothes of the accused stained with blood which matches the blood group of the deceased also supports the prosecution case. Both the accused filed the written say under section 313 of Cr.P.C in which they have admitted their presence at the time of occurrence but, according to them, they were not carrying any weapon at the relevant time. According to both the accused, Sherif (PW 1) was holding dagger and Yusuf was standing on his right side and when accused no.1 held the hand of Sherif (PW 1) he gave jerk to his hand. They do not state as to how Yusuf sustained injuries in their statements recorded under section 313 Cr.P.C. In the cross-examination, they have put

their case to all the eye-witnesses that when Sherif (PW 1) gave jerk to his hand, the dagger in his hand pierced the abdomen of Yusuf. From the evidence on record it was not possible for us to accept the defence theory as disclosed in 313 statement in view of their complicity which is evident from the testimonies of all the witnesses and attributing overt act to accused no.1 having assaulted the deceased with dagger. In so far as accused no.2 is concerned, the evidence of the eye-witnesses is consistent and they state that after the deceased was assaulted by accused no.1 with dagger, he banged his head on the chest of deceased Yusuf. Admittedly, he was not armed with any weapon. But that by itself would not be sufficient to hold that accused no.2 did not share the common intention. As a matter of fact, accused no.2 was the cause of quarrel with the deceased. Accused no.1 had absolutely no immediate reason or motive to commit the alleged offence. He seems to have gone to help his nephew accused no.2 at the relevant time. In the circumstances, we do not find any reason to discard the evidence of these witnesses against both the accused who had been assigned specific role by them all.

6. That takes us to consider the medical

evidence. The prosecution examined Dr. Bade (PW 7). His evidence and the post mortem report clearly shows that there was only one stab wound which is described by him as follows: "Stab would :- 8" below LT axilla mid axillary line measuring 1.1/2" x 1/2", margins and angles clean cut in between 7th and 8th ribs." Other two injuries were abrasions and they are absolutely negligible. On internal examination, the doctor noticed six wounds. However, he has clearly opined that they were possible with one blow of dagger. The doctor in his cross-examination has also opined that the blade 3 to 4 inches of the dagger was inserted in the body. Considering the nature of wounds, he further opined that the said injury was possible due to blow of dagger. His further opinion is also worth noting where he has stated that if a person standing near the deceased having knife in his hand and if the jerk is given to the hand, the knife can insert in the body. He has also opined that the wound suffered by the deceased however was not possible by accident. Keeping this in view and considering the evidence of all the three eye-witnesses, we find that it was possible for accused no.1 to inflict more blows if he had intention to kill the deceased. Keeping in view that this is a case of single blow, though to inflict more

blows was possible. and considering the evidence of all the three eye-witnesses, we have no hesitation in holding that the accused never intended to kill the deceased and, therefore, cannot be held guilty for the offence under section 302 IPC. The act of accused nos 1 and 2, in our opinion, though was with the knowledge that it was likely to cause death, but it was without intention to cause death and,therefore the case would fall under section 304 (Part II), as urged by Mr Gole. Ms Usha Kejariwal, learned APP, could not convince us on the basis of the evidence on record to take a different view. We were satisfied that accused no.2 also shared the common intention with accused no.1. The evidence in the form of recovery of the clothes and the report of chemical analyst support the prosecution in so far as their complicity is concerned.

7. Mr.Gole, learned counsel for the accused, on sentence, submitted that accused no.1 is prepared to pay fine of Rs.25,000/- in the nature of compensation to be paid to the old mother of the deceased and in that case he may be released with undergone sentence. According to Mr Gole, accused no.1 has undergone about 6-7 months of imprisonment in connection with the offence in the instant appeal. So far as accused

no.2 is concerned, he submitted that, looking to the nature of the allegations against him and/or the role allegedly played by him and his age, lesser fine be imposed on him. As far as quantum is concerned, he left it to the Court. He submitted that accused no.2 has also undergone about 5-6 months imprisonment in connection with the offence in the present appeal. This submission of Mr Gole was not seriously opposed by the learned APP. However, she submitted that in default of the payment of fine in the nature of compensation, the accused be sentenced to suffer atleast one year of imprisonment over and above the period they have already undergone. She further submitted that on depositing the amount of compensation, it may be paid to the old mother of the deceased and for that purpose appropriate directions be issued to the Sessions Court.

8. In the result, this appeal is partly allowed. The judgment and order of conviction of both the accused under section 302 read with 34 of IPC is quashed and set aside. Both the accused are hereby convicted for the offence punishable under section 304 (Part II) of IPC and are sentenced to suffer imprisonment already undergone. In addition thereto, accused no.1 is directed to deposit compensation of

Rs.25,000/- and accused no.2 Rs.15,000/- in the Sessions Court at Pune to be paid to the mother of the deceased within a period of ten weeks from today and in default each of the accused shall suffer imprisonment for one year and nine months respectively. On depositing the compensation as directed, same shall be made over to the mother of the deceased. The learned Sessions Judge, on depositing the amount of compensation by the accused, shall ensure that the amount is paid to the mother of the deceased within a period of eight weeks therefrom. On depositing the amount of compensation, bail bonds of the accused shall stand cancelled.

(D.B.Bhosale, J.) **(Smt Ranjana Desai, J.)**

HIGH COURT
CRIMINAL APPELLATE SIDE

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Date of Judgment:

16th June, 2005.

For approval and signature

THE HON'BLE SMT.JUSTICE RANJANA DESAI.

THE HON'BLE MR.JUSTICE D.B.BHOSALE.

1. Whether Reporters of Local Papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the Judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any Order made thereunder?

5. Whether it is to be circulated to the Civil Judges?

6. Whether the case involves an important question of law and whether a copy of

the judgment should be sent to Nagpur Aurangabad or Goa offices?